No. 80-1308

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIVIDAD OCANAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that the government improperly breached its plea agreement with them.

1. In September 1977, petitioners were indicted along with numerous co-conspirators in the United States District Court for the Southern District of Texas on charges of conspiracy to import marijuana, importation of marijuana, and conspiracy to distribute marijuana, in violation of 21 U.S.C. 963, 952(a), 846, 841(a), and 18 U.S.C. 2, respectively. Briefly summarized, the indictment alleged that the 30 individuals involved in the conspiracy floated bales of marijuana across the Rio Grande at a farm near Donna, Texas, transported them to a rented garage where they hid them in produce trucks, and shipped them to Oklahoma for sale to distributors (Pet. App. A-8).

Following the return of the indictment, the government promised to drop the remaining counts and agree to sentences of probation if petitioners would plead guilty to the count charging conspiracy to import. Relying upon this promise, petitioners Ocanas, Alvarado, Garza and de la Garza tendered guilty pleas on December 30, 1977.[1] The district court declined to accept their pleas, however. Instead, the court took the pleas under advisement, ordered presentence investigations, and set February 3, 1978, as the date for sentencing. We are informed by the United States Attorney's Office that, prior to the date set for sentencing, the court advised the prosecutors informally that it would not accept the plea agreement because it thought that sentences of probation were inappropriate in the circumstances of the case. Thereafter, on January 31, 1978, the government obtained a superseding indictment that charged essentially the same offenses as the original indictment but expanded the time period of the conspiracy by several months and added four defendants. On February 3, 1978, the district judge announced in open court that the guilty pleas would not be accepted, and all the defendants were allowed to withdraw their pleas (1 R. 141-143, 233-236). Petitioners were re-arraigned on February 10, 1978, and pleaded not guilty.

In late February 1978, petitioners filed motions to dismiss the indictment alleging that some of them had divulged incriminating facts to the probation officers conducting the presentence investigations and that this information had been improperly transmitted to law enforcement agents assigned to the case (1 R. 36-37, 45-46, 90-91, 104-105). Petitioners claimed that the prosecutors used this information to obtain the superseding indictment and that it should

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[1] Petitioner Casiano did not enter into a plea agreement (1 R. 92). "R." refers to the five volume record on appeal in the court of appeals.

therefore be dismissed. They also argued that the government had breached its plea bargain by filing the superseding indictment before the district court had accepted or rejected their pleas. At the hearing on petitioners' motion, however, the evidence showed that no "statements made in the course of plea bargaining or presentence investigation were used in preparing the second indictment or in presenting it to the grand jury" (Pet. App. A-11). Accordingly, the district court denied petitioners' motions to dismiss (I R. 233-236).

Thereafter, following a jury trial, petitioners were convicted on all counts of the superseding indictment (Pet. App. A-9).[2] The court of appeals affirmed, observing that petitioners had not been prejudiced by the aborted guilty plea proceedings before the trial court (*id.* at A-11, A-14). The court further explained that the district court had discretion to reject a plea bargain that would result in what it considered to be too light a sentence and that no abuse of that discretion had occurred in this case (*id.* at A-13 to A-14).

2. Petitioners' sole contention (Pet. 2) is that the government breached its plea bargain agreement by unilaterally withdrawing its consent to an unconsummated plea agreement. We agree with the court of appeals that, unless the government has gained some unfair advantage over the defendant because of his substantial, detrimental reliance on the plea agreement, the prosecutor may withdraw from a plea bargain until the agreement has been accepted by the district court. See, *e.g.*, Pet. App. A-14; *United States* v. *Calabrese*, Nos. 79-1388, 79-1390, 79-1392 (10th Cir.

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[2]Petitioner Ocanas was sentenced to concurrent five-year terms of imprisonment and a special parole term of four years on each of five counts. Petitioner Alvarado was sentenced to concurrent three-year terms of imprisonment and a special parole term of five years on each of three counts. Both petitioner Garza and petitioner de la Garza were sentenced to concurrent five-year terms of imprisonment and a special parole term of four years on each of eight counts.

Mar. 26, 1981), slip op. 20-21; *Roe* v. *United States Attorney*, 618 F. 2d 980, 982 (2d Cir. 1980); *Government of the Virgin Islands* v. *Scotland*, 614 F. 2d 360, 363-365 (3d Cir. 1980). But see *Cooper* v. *United States*, 594 F. 2d 12 (4th Cir. 1979). That issue, however, is not presented by this case. Rather, here the government sought a superseding indictment only after the district court rejected the plea agreement because petitioners, who were participants in a large-scale drug conspiracy, would have received inadequate sentences of probation.[3] As Rule 11(e)(4) of the Federal Rules of Criminal Procedure makes clear, the district court had discretion to reject a plea agreement that would result in an insufficient sentence. See, *e.g.*, *United States* v. *Bean*, 564 F. 2d 700, 702-704 (5th Cir. 1977). The court of appeals correctly concluded that the district court did not abuse its discretion under Rule 11(e)(4), and further review of that fact-bound question is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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[3]Petitioners suggest (Pet. 2) that this Court should adopt a rule barring the government from withdrawing from a plea agreement in order to prevent the prosecutor from using "plea bargain statements to develop further indictments." In this case, however, the court of appeals determined that nothing in the record supports petitioners' contention that the government used any plea bargain statement to obtain or prepare the superseding indictment (Pet. App. A-11).